EXHIBIT A

From: law nikagholston.com
To: Maya Anderson; Joan Andrews
Cc: Sarah Vaughn; Katie Cox
Subject: Re: DP-2425-04B: Final Decision
Date: Tuesday, March 25, 2025 10:53:36 AM
Attachments: Findings of Fact and Final Order .pdf

Dear Counsels:

Please take notice that there was an error on page 25; the language should read "create a skill acquisition program individualized for P.H. with pertinent goals matched to **Utah** Standards."; see Corrected Order attached.

I apologize for any confusion or inconvenience.

Thank you,

NG

From: Maya Anderson <mvanderson@disabilitylawcenter.org>
Sent: Monday, March 24, 2025 9:01 PM
To: law nikagholston.com <law@nikagholston.com>; Joan Andrews <jandrews@fabianvancott.com>
Cc: Sarah Vaughn <svaughn@fabianvancott.com>; Katie Cox <kcox@disabilitylawcenter.org>
Subject: Re: DP-2425-04B: Final Decision

Madam Hearing Officer Gholston,

I can confirm that Petitioner's counsel have received the decision. Thank you very much for all of your work in this case.

Best,
Maya A.

--
Maya Anderson
Staff Attorney

Phone: (801) 363-1347 ext. 3217
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From: "law nikagholston.com" <law@nikagholston.com>
Date: Monday, March 24, 2025 at 7:27 PM

To: Maya Anderson <mvanderson@disabilitylawcenter.org>, Joan Andrews <jandrews@fabianvancott.com>
Cc: Sarah Vaughn <svaughn@fabianvancott.com>, Katie Cox <kcox@disabilitylawcenter.org>
Subject: DP-2425-04B: Final Decision

Dear Counsels:

Please confirm your receipt of the Final Decision for DP-2425-04B, P.H. v. Jordan School District.

Thank you,

Nika Gholston, Esq.
Nika Gholston Law, L.L.C.

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IN THE ADMINISTRATIVE LAW COURT OF THE UTAH DEPARTMENT OF EDUCATION SPECIAL EDUCATION SERVICES DIVISION DUE PROCESS HEARING

In the Matter of: **P.H.,** a minor, by and through a parent, Alisha Hadden *Petitioner*, v. **Jordan School District**, *Respondent*.	**DECISION AND ORDER** **Case Number: DP-2425-04B** **Hearing Officer: Nika Gholston**

FINDINGS OF FACT AND FINAL ORDER

Jurisdiction:

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§1400, et seq.; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; Utah State Bd. of Educ., Special Educ. Rules IV.M. (2)-(3)(a)-(e), (2016).

Procedural History:

Petitioner is the parent of P.H. ("Student") who is currently classified by the Jordan School District (JSD) as a student with an educational disability of Autism. On September 24, 2024, Petitioner filed a Due Process Complaint against JSD alleging a denial of FAPE, specifically the Parent alleges that JSD predetermined P.H.'s educational placement and IEP through a district-level LRE process. The Parent further alleges that she was denied an opportunity to meaningfully participate in the IEP process because decisions were made by the district prior to IEP team meeting.

A remote due process hearing convened on February 3-5, 2025. The Parent was represented by Maya Anderson and Katie Cox, Attorneys for The Disability Law Center. JSD was represented by Joan Andrews and Sarah Vaughn, Attorneys at Fabian Vancott.

Issues Presented:

1. Did JSD deny Student a free and appropriate public education ("FAPE") by failing to offer a continuum of alternative placement, instead limiting the services and placements Student received on the basis of resource availability?

2. Did JSD deny Student FAPE by determining Student's placement and services through a District-level LRE Committee?

3. Did JSD deny Student FAPE by failing to ensure that Student's parents were afforded the opportunity to meaningfully participate in IEP meetings?

4. Did JSD deny Student FAPE by failing to develop and implement an IEP that was reasonably calculated to allow Student to make progress in light of Student's unique needs?

Burden of Proof:

On November 14, 2005, the United States Supreme Court issued a decision in Schaffer v. Weast, the majority held that, "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 129 S. Ct. 528 (2005). Here, the burden of proof is placed on the Petitioner.

Exhibits Admitted into Evidence

There were numerous exhibits submitted by the parties and accepted into evidence by the undersigned. These exhibits have been examined by the undersigned subsequent to the Due Process Hearing in light of the testimony presented at said hearing. The undersigned placed no weight on the fact that any particular matter was offered by any party since the purpose was to get

all of the appropriate documents produced for consideration by the undersigned so long as they were not prejudicial to any other party participating in the Due Process Hearing based upon objection. The documents were examined and the weight given to each was based upon the contents of the document which was submitted and not on which party introduced said document. The undersigned has examined the exhibits based upon the substantive nature contained therein for the purpose of making a decision in this matter.

Petitioner's Witnesses

1. Angela Johnston, UT -Licensed Teacher
2. Alisha Hadden, Parent

Respondent's Witnesses

1. Carollee Tautkus, Special Education Teacher Specialist
2. Cassidy Wood, Teacher
3. Kathleen Garibaldi, School Psychologist
4. Ben Washburn, Behavior Specialist
5. Victoria Gustafon, Teacher Specialist
6. Brian King, Assistant Special Education Director
7. Kim Lloyd, Special Education Director

Joint Statement of Undisputed Facts and Material Admissions

1. For the entirety of the 2022-2023 school year, Student attended kindergarten in a special class placement located at Golden Fields Elementary School ("Golden Fields").

2. For the 2022-23 school year, Student's initial operative IEP was dated May 27, 2022. *See* Respondent's Exhibit 9.

3. For the 2022-23 school year, Student's initial operative Behavior Intervention Plan ("BIP") was dated December 15, 2022. *See* Joint Exhibit 2.

4. During the spring of 2023, a psychoeducational assessment and evaluation was performed. *See* Joint Exhibit 6.

5. During the 2022-23 school year, IEP meetings were held April 12, 2023, May 22, 2023, and May 26, 2023.

6. A new IEP was developed and signed by the parties dated May 26, 2023. *See* Joint Exhibit 16.

7. At the beginning of 2023-2024 school year, Student initially continued to attend 1st grade in a special class placement at Golden Fields.

8. IEP meetings were held on September 25, 2023, and October 10, 2023.

9. On or around November 1, 2023, Student began attending 1st grade in a special class at Herriman Elementary School.

10. Additional IEP meetings were held January 3, 2024, and January 31, 2024.

11. An IEP annual review team meeting was held on February 7, 2024. *See* Joint Exhibit 72.

12. On or about February 7, 2024, a Functional Behavioral Assessment was completed. *See* Joint Exhibit 71.

13. On May 9, 2024, an IEP meeting was held.

14. On May 9, 2024, Parent requested an Independent Educational Evaluation. *See* Joint Exhibit 87.

15. The Parent's IEE Request was granted.

16. The IEE was performed by Dr. Keith Radley.

17. Dr. Radley provided a report dated May 26, 2024. *See* Joint Exhibit 91.

18. An IEP Team meeting was held on May 29, 2024. *See* Joint Exhibit 93.

19. The IEP Team, with the participation of Dr. Radley, completed a revised FBA and BIP. *See* Joint Exhibit 92.

Findings of Facts:

20. Angela Johnston is a UT- licensed teacher and BCBA.

21. Angela Johnston is a cluster lead over three (3) autism clusters at Rose Creek Elementary School.

22. A cluster is a self-contained classroom.

23. Clusters are divided by grade level.

24. Angela Johnston does not provide direct instruction to students but interacts with students who need behavioral support.

25. Angela Johnston collects behavioral data and is responsible for behavior intervention plans (BIP).

26. Angela Johnston was introduced to Student and Parent in September 2024.

27. On September 03, 2024, Angela Johnson held an intake meeting with Parent at Rose Creek Elementary School.

28. Student arrived at Rose Creek with a BIP.

29. There is no seclusionary time-out unit in the autism unit at Rose Creek.

30. Student has not been placed in restraint(s) in the autism unit at Rose Creek.

31. The "chunking" intervention is used to reduce the amount of work given to a student to make the assignments manageable when students feel overwhelmed.

32. P.H. has made progress with the chunking intervention.

33. Teacher support specialists support teachers through brainstorming, teaching strategies, and providing interventions.

34. Teacher specialists attend IEP meetings, when invited.

35. Carollee Tautkus reports to Kim Lloyd.

36. Kim Lloyd is the Special Education Director.

37. Carollee Tautkus met Student in 2021 during a classroom visit at Golden Fields Elementary. (Hearing Day 3, page 27, Lines 6-12)

38. The IEP Team at Golden Fields met to consider the recommendations made by the LRE Committee that determined Student's placement should be Herriman ES. (JE-55-1).

39. Carollee Tautkus stated there was not a LRE Committee. (Hearing Day 3, Page 31, Line 22).

40. Tautkus did not know why JSD documents and teacher mention/reference an LRE Committee.

41. A SEB classroom (unit) is a social-emotional behavior support classroom.

42. Brian King is Carollee Tautkus' direct supervisor.

43. Brian King is the Assistant Director of Special Education.

44. Carollee Tautkus has access to student IEPs.

45. Carollee Tautkus denied that JSD had a LRE process.

46. JBAT is the Jordan Behavior Assistance Team.

47. JSD has resources available at the district level, called "district resources."

48. JSD has resources available at the school level, called "school resources."

49. The LRE Committee informs the teachers what resources are available to them. (Hearing Day 3, Page 85, Lines 19-20).

50. The LRE Committee meets on Wednesdays. (Hearing Day 3, Page 86, Lines 2-3).

51. Student's teacher believed that the district decided that placement at Kauri Sue was not a good option for him. (Hearing Day 3, Page 94, Lines 12-24).

52. Kathleen Garibaldi is a school psychologist.

53. Ben Washburn is a behavior specialist who works with JBAT.

54. Victoria Gustafon is a teacher specialist who worked with P.H. at Herriman ES.

55. Special classrooms are district resources. (Hearing Day 4, Page 136, Lines 15-16).

56. Brian King is not a core member of the IEP as he lacks special knowledge about individual students. (Hearing Day 4, Page 144, Lines 18-21).

57. Brian King has knowledge of a JSD LRE Committee that is no longer in effect. (Hearing Day 4, Page 146, Lines 14-19).

58. JSD follows the LRE process currently outlined in the technical assistance manual. (Hearing Day 4, Page 162, Lines 10-13).

59. All schools in the JSD district do not have self-contained classrooms.

60. A school resources is something that is inherently available within the school. (Hearing Day 4, Page 152, Lines 15-16).

61. A district resource is support that is available via collaboration with a teacher specialist. (Hearing Day 4, Page 153, Line 2-7).

62. There are a limited number of self-contained classrooms in the district. (Hearing Day 4, Page 152, Lines 4-5).

63. Student's Kindergarten teacher was Cassidy Wood.

64. In an email dated, February 21, 2023, the special education teacher and school psychologist express concerns about P.H. being placed in an SEB unit.

65. P.H.'s special education teacher believed that he would benefit from placement at Kauri Sue or an Autism unit.

66. P.H.'s special education teacher did not believe that he would do well in an SEB unit.

67. In a communication between the school psychologist and the parent, the psychologist noted "I don't know what the district will suggest but that [Kauri Sue] would be a good option."

68. On May 3, 2023, the teacher specialist directed the special education teacher to have a conversation with the Parent regarding considering a SEB support classroom for Student. The teacher was directed to let the specialist know the outcome of the conversation with the Parent. The teacher specialist stated that [we] can then look at moving forward with a meeting. (JE-38-1).

69. In an email dated May 08, 2023, it is revealed that the Parent is "upset and worried" after having a conversation with the teacher specialist who recommended a SEB unit. (JE-40-1).

70. In an email dated May 08, 2023, the special education teacher and school psychologist reference the "LRE team" and note that they "will not move him before next year, the idea is he will start the new year at the other school."

71. On October 20, 2023, the JSD LRE Review Office sent a letter providing notice to the principal at Golden Fields Elementary that P.H.'s placement is Herriman Elementary School- SEB unit.

72. In an email communication between the special education teacher and parent, the teacher informed parent that "they will only offer SEB." (JE-99-69)

73. The parent was offered placement in SEB units at Herriman Elementary and Elk Meadows Elementary.

74. The parent refused placement in an SEB unit at Elk Meadows.

75. In a communication between the parent and special education teacher, the teacher informed the parent that after meeting with the district "it sounds like the district is open to whatever you [parent] would want so that's positive." (JE-99-71)

76. Student's IEP dated 02/07/2024 included the following special education services:

Math – 325 Minutes
Reading – 375 Minutes
Writing – 100 Minutes
Behavior – 981 Minutes

(JE-72-17)

77. Student's IEP dated 02/07/2024 fails to explain how the services correlate to his goals.

78. Student's IEP dated 02/07/2024 fails to explain how the services will be implemented; the IEP lacks identified program modalities to be used by teachers and/or other providers.

Applicable Standards and Analysis

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. §1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. V. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. V. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP is developed by its IEP team through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-7). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through and IEP" (Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]. Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. 189, 199).

An appropriate educational program begins with an IEP that includes a statement of the student's present level of academic achievement and functional performance (see 34 CFR 300.320[a][1], establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A], and provides for the use of appropriate special education

services (see 34 CFR 300.320[a][4]). In developing the recommendations for a student's IEP, the IEP team must consider the results of the initial or most recent evaluation the student's strengths, the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (see 34 CFR 300.324[a]).

Federal circuit courts have provided guidance on how to determine whether implementation has occurred and the degree to which any flawed implementation constitutes a denial of FAPE. In essence, the IDEA's implementation mandate does not mean that, to provide FAPE, a district must perfectly implement a student's IEP. A minor discrepancy between the services provided and services required under the IEP is not enough to amount to a denial of FAPE. See I.Z.M. v. Rosemunt-Apple Valley-Eagan Pub. Schs., 70 IDELR 86 (8th Cir. 2017). An IEP is not required to "furnish[] … every special service necessary to maximize each handicapped child's potential." Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 (2d Cir. 2003) (citation and internal quotation marks omitted).

The Fourth, Fifth, Eighth, Ninth, and Eleventh Circuit Courts of Appeal have held that only a material implementation failure will qualify as a denial of FAPE. See Sumter County Sch. Dist. 17 v. Hefferman, 56 IDELR 186 (4th Cir. 2011); Houston Indep. Sch. Dist. v. Bobby R., 31 IDELR 185 (5th Cir. 2000), cert denied, 111 LRP 30885, 531 U.S. 817 (2000); Neosho R-V Sch. Dist. v. Clark, 38 IDELR 61 (8th Cir. 2003); Van Suyn v. Baker Sch. Dist. 5J, 47 IDELR 182 (9th Cir. 2007), reprinted as amended, 107 LRP 51958, 502 F.3d 811 (9th Cir. 2007); and L.J. v. School Bd. of Broward County, Fla., 74 IDELR 185 (11th Cir. 2019).

Least Restrictive Environment

The IDEA requires that a student's recommended program be provided in the Least Restrictive Environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; Newington, 546 F.3d at 112, 120- 21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]).

In the present case, the Petitioner alleges that JSD denied P.H. FAPE by predetermining his LRE environment.

Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." H.B. v. Las Virgenes USD, 239 Fed. Appx. 342 (9th Cir. 2007). Predetermination of a student's IEP amounts to a procedural violation of the IDEA "if it deprives the student's parents of meaningful participation in the IEP process." B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343 358 (E.D.N.Y. 2014). For an IEP to be predetermined, the district must "not have an open mind" to consider alternative programs or services during the meeting. T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 253 (2d Cir. 2009). Mere parental disagreement with a school district's IEP and placement recommendation does not amount to a denial of meaningful participation. See B.K., 12 F. Supp. 3d at 359 ("The mere fact that the CSE's [IEP team's] ultimate recommendation deviated from the express request [of the Parents] does not render the Parents 'passive observers' or evidence any predetermination on the part of the CSE [IEP team])." (citations omitted)); P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 (S.D.N.Y. 2008) ("The mere fact that the district staff ultimately disagreed with the opinions of plaintiffs and their outside professionals does not mean that plaintiffs were denied the opportunity to participate in the development of the IEP's, or that the outcomes of the CSE [IEP team] meetings were 'pre-determined.' A professional disagreement is not an IDEA violation."); Sch. For Language & Commc'n Dev. v. New York State Dep't of Educ., No. 02 CV 0269 JS JO, 2006 WL 2792754, at *7 (E.D.N.Y. Sept. 26, 2006) ("Meaningful participation does not require deferral to parent choice." (citations omitted)).

Predetermination is not synonymous with preparation." Nack ex rel. Nack v. Orange City Sch. Dist., 454 F. 3d 604, 610 (6th Cir. 2006). "IDEA regulations allow school districts to engage in 'preparatory activities … to develop a proposal or response to a parent proposal that will be discussed at a later meeting' without affording the parents an opportunity to participate." T.P.,

554 F.3d at 253 (citations omitted). School districts are permitted to come prepared to the CSE [IEP team] meeting with a draft IEP – as long as it has not been finalized, and the parents are not deprived of "the opportunity to meaningfully participate in the IEP development process." M.M. ex rel. A.M. v. New York City Dep't of Educ., Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506 (S.D.N.Y. 2008) (citations omitted); see also Dirocco ex. Rel. M.D. v. Bd. of Educ. of Beacon City Sch. Dist., No. 11 CIV 3897 ER, 2013 WL 25959, at *18 (S.D.N.Y. Jan. 2, 2013); Nack, 454 F.3d at 611 ("[S]chool evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." (citation and internal quotation marks omitted)); W.S. ex rel. C.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 (S.D.N.Y. 2006) (Equating draft IEPs containing proposed placements with predetermination "will inevitably lead to gamesmanship in the preparation of IEPs by CSEs [IEP teams], with the district withholding points of view that ought to be out on the table and subject to discussion and parental challenge (which may or may not be successful) prior to the document's finalization.")

The IDEA contains a subsection titled "Least Restrictive Environment (LRE)." The subsection provides: "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are [to be] educated with children who are not disabled …" 20 U.S.C. § 1412(a)(5). States that receive federal special education funding must ensure that:

> [S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The text of the subsection, providing that taking the child out of the mainstream only when satisfactory education cannot be achieved with supplementary aids and services, creates an

affirmative obligation to provide the supplementary aids and services to forestall the possibility of moving the child to a separate setting outside of regular classes. It also supports the observation that special education is a bundle of services and accommodations to enable a child who has disabilities to learn, rather than a place to put a child. The provisions of IDEA covering IEPs reinforce that message. An IEP must include:

> (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child –
>
> (aa) to advance appropriately toward attaining the annual goals; and
>
> (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
>
> (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph; and
>
> (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc).
>
> 20 U.S.C. § 1414(d).

Here, the Petitioner argues that JSD reached outside the scope of permissible administrative oversight of special education programs by developing and implementing a LRE Review Process, which is documented in its explanatory LRE Process Manual. Per the LRE Process Manual, JSD maintained "school resources" and "district resources." Per the manual, district resources were noted as "not inherently available to IEP teams at the school level and may be considered only by collaborating with a special education teacher specialist." It is noted that self-contained classrooms and special schools were listed as district resources. The manual further notes that any service or placement designated as a "district resource" can only be considered after "exhausting all school resources and available district supports." Based on the foregoing, the

Petitioner asserts that the IEP team for P.H. could not make changes to his LRE environment without prior approval from the District's LRE Review Process.

To further support their argument, the Petitioner proffered P.L. and M.L. v. New York City Dep't of Educ., wherein the Eastern District of New York found the local educational agency denied [a student] FAPE because the student's unique needs were not considered when it offered it's "standard proposal" for students on the autism spectrum. P.L. and M.L. v. New York City Dep't of Educ., 56 F. Supp. 3d 147, 165 (E.D.N.Y. 2014). The Petitioner posits that the student in the present case is similarly situated like "M.L." Petitioner avers that P.H., like "M.L.", was offered no specific reason(s) for his placement in his LRE; that JSD only provided vague reasons (i.e., "an SEB could handle the [Student's] BIP"; "[an SEB could] provide the support that he requires) for P.H.'s LRE placement.

More concerning is the Petitioner's allegation that P.H.'s assignment in the SEB unit essentially the result of the District's limited placement resources; the SEB unit was the only class available to accommodate P.H. at the time of placement.

Next, the Petitioner turned its attention to communications between the IEP team members regarding P.H.'s LRE environment. Petitioner specifically points to an email dated February 21, 2023, between the special education teacher and school psychologist wherein the teacher expresses concern about P.H. being placed in an SEB unit. The teacher believes P.H. would benefit from placement at Kauri Sue Hamilton School or an Autism unit. The school psychologist also notes that she believed Kauri Sue to be a good placement option, but "did not know what the district would suggest." Finally, the Petitioner asserts that P.H.'s placement in an SEB was not reasonably calculated according to his individual needs because there was no data to support the decision. Petitioner offered parental observations of P.H.'s behaviors in the home environment, Functional Behavioral Assessment (FBA) data, and data from a psychoeducational

evaluation conducted in April 2023 to support its argument that the decision to place P.H. in an SEB unit was unfounded; furthermore, there was no support for the placement at the IEP team level.

Conversely, the District argues that it maintains a full continuum of placements and specifically considered said continuum with respect to P.H. The District denies that P.H.'s LRE was predetermined at the administrative level and maintains that it was appropriately determined by the IEP team. The District avers that P.H.'s appropriate placement is a self-contained classroom within a general education school.

To support its LRE decision, the District cites Ellenberg v, New Mexico Mil. Inst., 478 F.3d 1262, 1277 (10th Cir. 2007) (citing L.B. ex. Rel. K.B. v. Nebo School District, 379 F. 3d 966 (10th Cir. 2004) wherein the court developed a test for determining whether an educational placement is a student's LRE; [courts] look to (1) 'whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily;' and (2) 'if not, if the school district has mainstreamed the child to the maximum extent appropriate.'

A closer examination of Nebo is relevant here:

In Nebo, the Court adopted the two-part test previously stated in Daniel R.R. v. Bd. Of Education, 874 F.2d 1036 (5th Cir. 1989): (1) determines: whether education in a regular classroom, with the use of supplementary aids and services can be achieved satisfactorily; and (2) if not, the court determines if the school district has mainstreamed the child to the maximum extent appropriate. Next, the Court outlined four factors to be considered in determining the first part of the test:

(1) Steps the school district has taken to accommodate the child in a regular classroom, including the consideration of a continuum of placement and support services;

(2) Comparison of the academic benefits the child will receive in the regular classroom with those [s]he will receive in the special education classroom;

(3) The child's overall educational experience in regular education, including non-academic benefits; and

(4) The effect on the regular classroom of the disabled child's presence in that classroom.

On the contrary, the District contends that it has satisfied the Nebo test. As evidence, the District points to its review of P.H.'s IEPs and placement history; its review of data from P.H.'s psychoeducational assessment and other test results; P.H.'s IQ; and several IEP team meetings held to discuss P.H.'s LRE placement. While the District does not dispute that IEP team members were considering Kauri Sue Hamilton, a special school, as an appropriate placement for P.H., it contends that it was the IEP team's review of student data and subsequent IEP team discussions that ultimately led to a finding that the school was not an appropriate placement.

Parental Participation

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that LEAs take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; SpEd Rules III.G.).

Although school district's must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP or placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545 at *8, *10; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y Aug 19, 2013][stating that "as long as the parents are listened to, "the right to participate in the

development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008][noting that "[a] professional disagreement is not an IDEA violation"]; Sch. For Language & Commc'n Dev v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006][finding that "[m]eaningful participation does not require deferral to parent choice"]).

When determining whether a school district has complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dept' of Educ., 584 F.3d 412, 420 [2d Cir. 2009][noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

In the present case, the Petitioner alleges that they were denied an opportunity to meaningfully participate in the development of P.H.'s IEP. To support its argument, the Petitioner asserts that the District held formal, regularly scheduled "LRE Committee" meetings between teacher specialists and the district administrators to discuss concerns regarding P.H.'s IEP and placement decisions. The Petitioner contends that these placements meetings extended beyond the scope of the IDEA's regulations at 34 CFR § 300.501(1)(3), which provides that a "meeting" for the purposes of the parent participation requirement does not include "informal or unscheduled conversations" or "preparatory activities […] to develop a proposal or response to a parent proposal that will be discussed at a later meeting."

The Petitioner contends that the District's LRE Committee met on a scheduled and consistent basis to discuss and predetermine student placements in anticipation of IEP team meetings. And, that IEP teams meetings were merely performative to satisfy the parental participation requirement. As evidence, the Petitioner cites communications between IEP team members wherein, they discuss concerns about P.H.'s placement in a SEB unit. (JE-25-1). The Petitioner next points to an email dated May 03, 2023, where the teacher specialist is directing the special education teacher to have a conversation with the parent about considering a SEB support classroom. The teacher is then directed to "let me [the district] know how it went. We can then look at moving forward with a meeting." (JE-38-1). The Petitioner also cites an email dated May 08, 2023, where it is revealed that the Parent is "upset and worried" after having a conversation with the teacher specialist who recommended a SEB unit. (JE-40-1).

IEP Reasonably Calculated to Allow Student to Make Progress

An appropriate educational program begins with an IEP that includes a statement of the student's present level of academic achievement and functional performance (see 34 CFR 300.320[a][1], establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A], and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]). In developing the recommendations for a student's IEP, the IEP team must consider the results of the initial or most recent evaluation the student's strengths, the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (see 34 CFR 300.324[a]).

Federal circuit courts have provided guidance on how to determine whether implementation has occurred and the degree to which any flawed implementation constitutes a denial of FAPE. In essence, the IDEA's implementation mandate does not mean that, to provide FAPE, a district must perfectly implement a student's IEP. A minor discrepancy between the services provided and services required under the IEP is not enough to amount to a denial of FAPE. See I.Z.M. v. Rosemunt-Apple Valley-Eagan Pub. Schs., 70 IDELR 86 (8th Cir. 2017). The Fourth, Fifth, Eighth, Ninth, and Eleventh Circuit Courts of Appeal have held that only a material implementation failure will qualify as a denial of FAPE. See Sumter County Sch. Dist. 17 v. Hefferman, 56 IDELR 186 (4th Cir. 2011); Houston Indep. Sch. Dist. v. Bobby R., 31 IDELR 185 (5th Cir. 2000), cert denied, 111 LRP 30885, 531 U.S. 817 (2000); Neosho R-V Sch. Dist. v. Clark, 38 IDELR 61 (8th Cir. 2003); Van Suyn v. Baker Sch. Dist. 5J, 47 IDELR 182 (9th Cir. 2007), reprinted as amended, 107 LRP 51958, 502 F.3d 811 (9th Cir. 2007); and L.J. v. School Bd. of Broward County, Fla., 74 IDELR 185 (11th Cir. 2019).).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F. 3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize"

the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The Court in Endrew held that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" and the "nature of the IEP process [] ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue; thus, by the time any dispute reaches court, school authorities will have had the chance to bring their expertise and judgment to bear on areas of disagreement" (Endrew F. , 580 U.S. at p. 404). Lastly, the Supreme Court held that the "reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (id).

Here, the Petitioner contends that P.H.'s IEP was not reasonably calculated to allow him to make progress because it was developed at the administrative level and not by the IEP team. As such, the IEP focused less on student's needs and more on resource availability. The Petitioner also suggests that P.H.'s IEP at Herriman Elementary (start date 01/31/2024) was further complicated by the way it was written. P.H.'s services were to be provided in total weekly minutes (i.e., 981 minutes of behavior) with no explanation how they would be administered and measured.

The District argued that the Petitioner used a hindsight approach to challenge the appropriateness of P.H.'s IEPs. However, it failed to introduce sufficient evidence to support a finding that P.H.'s most recent IEP is appropriate.

Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir.1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the

student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Conclusions of Law

In consideration of the foregoing facts and arguments, the undersigned finds:

1. That the Petitioner has satisfied its burden to prove that during the relevant time-period the Jordan School District developed and maintained a LRE Process that predetermined P.H.'s educational placement and special education services.
2. That P.H.'s IEP was not reasonably calculated to allow him to make progress.
3. That predetermination precluded Petitioner's parent active participation in his educational program.

ORDER

The undersigned finds in favor of the Petitioner and Student, and against the Respondent (Jordan School District), and hereby grants the Petitioner the following relief:

1. Petitioner is the prevailing party.
2. JSD is ordered to fund an independent thorough and appropriate evaluations for the purposes of identifying current baselines across P.H.'s educational performance areas of Academics, Communication, and Social/Emotional Development. This shall include, but not limited to: Cognitive, Achievement, Behavior, Adaptive Functioning, Speech/Language (to include pragmatics), Occupational Therapy (to include sensory/attention observation in instructional settings). JSD will reimburse the parent for the transportation costs associated with the IEE at the mileage rate typically reimbursed to JSD employees.
3. JSD shall utilize mutually agreed-upon third party reading specialist to assess P.H. for skill deficits in reading comprehension, fluency, written expression and other skills necessary for academic reading.

4. JSD shall utilize the services of a mutually agreed-upon third party psychometrist to assess P.H. in the area of math including, but not limited to, math computation and other mathematical concepts.

5. Within twenty-one (21) days of receiving the afore-mentioned evaluation results/reports, JSD shall convene a facilitated IEP team meeting.

6. JSD shall invite the psychometrist, math coach, and reading specialist to the IEP team meeting to perform the following tasks:
   a. Explain the results of the assessments conducted to the IEP team and the reasonable recommendations, including the reading/math program that would be appropriate for P.H.
   b. Notate, within the IEP, the appropriate frequency level of services as recommended by the adopted reading/math program, define the data collection that will be taken to monitor progress, and provide verification to the Parent that the teacher and any other staff members who will be providing instruction to P.H. in these areas, meets the competency requirements, as specified in the adopted reading/math program, for instructing students in the given program.
   c. Train applicable staff on the proper methods of data collection to monitor Student's progress with the reading/math program.
   d. Participate as a team member of P.H.'s IEP team through at least the end of the 1st semester of the 2025-2026 school year.
   e. Provide recommendations for program modifications as needed.

7. JSD shall provide P.H. with one hundred (100) hours compensatory, remedial educational services in behavior, speech, math and reading based upon his deficits and areas of need identified in the evaluations and assessments previously referenced in this Order as well as progress and data collections throughout the 2024-2025 school year. The compensatory services shall be delivered during the 2025 summer through the first semester of the 2025-2026 school year.
   (i) The location and schedule for the services will be determined by the IEP Team prior to the beginning of the services, based on the availability and schedules of the service provider(s) and, to the extent reasonable, the Parent.
   (ii) The remedial services pursuant to this Paragraph will be offered regardless of whether the IEP Team determines Student qualifies for Extended School Year ("ESY") services. If Student qualifies for ESY services during the summer of 2025, any remedial services offered and available during that time-period are in addition to ESY hours.
   (iii) If Student is unable to attend a remedial service session pursuant to this Paragraph, the Parent will provide notice to JSD at least twenty-four (24) hours in advance of the scheduled session. If Student fails to attend two (2) remedial service sessions without the provision of notice, JSD's obligation to provide any further remedial services pursuant to this Paragraph will cease. "Notice" for the purposes of this subparagraph means contacting a JSD representative either by phone/voicemail or email at least 24 hours in advance. JSD will designate in writing the representative (including contact information) to whom the Parent should provide notice.

8. JSD shall provide P.H. a mutually agreeable Board Certified Behavior Analyst ("BCBA"), who will collect all collateral information, including without limitation, interviews with relevant School District staff working with P.H., the Parent and any private counselors and therapists; review, as requested by the BCBA, pertinent education records and any private healthcare or service provider reports available to the School District and, thereafter, perform a Functional Behavior Assessment ("FBA"), and, if deemed appropriate by the BCBA, develop a Behavior Intervention Plan ("BIP") to address P.H.'s behaviors that impact his learning and educational performance. In addition, the BCBA will do the following:

    a) The BCBA will consider P.H. as the client pursuant to the Behavior Analyst Certification Board (BACB) ethical requirements.

    b) Make recommendations to the IEP team on whether developmental assessments (i.e., ABLLS) would be beneficial and, if adopted by the IEP team, conduct said assessment and explain results to the IEP team. Using the data from the FBA, and any other assessments completed, create a skill acquisition program individualized for P.H. with pertinent goals matched to Utah Standards.

    c) If a BIP is developed, the BCBA will develop a data collection system to be used by School District staff in assessing P.H.'s progress with the BIP in reducing target behaviors. Also, train applicable staff have been trained to a level of competency using a competency checklist established by the BCBA on the BIP and in any areas where the IEP team is incorporating goals, plans or programs. Incorporate periodic integrity checks and provide additional training if it becomes necessary.

    d) Make recommendations on whether changes need to be made to P.H.'s Least Restrictive Environment (LRE) based upon the evaluations and his abilities and needs. Work with School District Staff to accommodate P.H. into the General Education setting to the maximum extent appropriate.

    e) Make recommendations regarding the need for ABA Strategies to be provided for the Petitioner inside the school setting.

    f) Provide parent training on the strategies recommended and adopted by the IEP team.

    g) Make recommendations regarding the need for targeted trained Aide support to assist P.H. in skill acquisition and make academic gains inside the general education setting. This would include any recommendations applicable to P.H.'s preferred means of communication.

    h) Once the services pursuant to this Paragraph are completed, the IEP Team will consider the reasonable educational recommendations of the BCBA for on-going support to assist staff in the appropriate implementation of P.H.'s program.

i) Work with the District's SLP, if applicable, and teachers and staff to create a plan, to include competency-based training, to promote and encourage P.H.'s social skills and communication skills throughout the day.

j) The BCBA shall be invited to attend, as a participating member of the team, any IEP meetings convened until deemed not necessary based on P.H.' progress and behavior intervention plan data through the end of the first semester of the 2025-2026 school year.

DONE AND ORDERED this the 24th day of March 2025.

Notice of Right to Appeal

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision herein has the right to bring a civil action in the appropriate Court under 20 U.S. C. Section 1415. Pursuant to State Bd. of Educ., Special Education Rules IV. P., (2016), this decision may be appealed. If appealed, the appeal must be filed within thirty (30) days of the due process hearing decision. Sped. Rule IV.S. (2).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Decision has been forwarded to the following individuals by electronic mail on this the 24th day of March 2025.

Maya Anderson, Esq.
Joan Andrews, Esq.
Katie Cox, Esq.
Sarah Vaughn, Esq.

/s/ Nika Gholston
Nika Gholston
Due Process Hearing Officer